DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,370

In re: 4009 3rd Street, S.E. Unit #B1

Ward Eight (8)

WINN MANAGEMENT/
ATLANTIC GARDENS APARTMENTS
Housing Provider/Appellant

v.

DEBRA BURTON
Tenant/Appellee

DECISION AND ORDER

May 12, 2008

PER CURIAM. This case is on appeal from a decision and order of District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), Office of Adjudication (OAD), to the Rental Housing Commission (Commission), pursuant to the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), and the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001). The District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (2004) also apply.

I. PROCEDURAL HISTORY

Debra Burton, the tenant of unit B1 of the housing accommodation located at 4009 3rd Street, S.E., filed Tenant Petition (TP) 28,370 with the RACD on July 8, 2005. In her petition she alleged that her housing provider, Winn Management violated the Act when they substantially reduced the services and facilities provided in connection with

her unit and retaliated against her in violation of § 502 of the Act. The housing provider failed to appear either personally or through a representative at the RACD hearing. The tenant and her attorney, Margie Sollinger appeared and presented evidence to support the allegations in her tenant petition. On July 6, 2007, Hearing Examiner Dorothy Greer in the RACD, issued a decision and order in TP 28,370. In her decision and order, the hearing examiner found that the tenant proved, by a preponderance of the evidence, that the housing provider violated D.C. OFFICIAL CODE § 42-3502.05 (2001) and 14 DCMR § 4211.6 (2004) by substantially reducing services provided in connection with her unit, and by retaliating against petitioner in violation of § 502 of the Act.

Accordingly, the hearing examiner rendered a default judgment against the housing provider. The housing provider filed a motion for reconsideration on July 23, 2007. On August 6, 2007, the motion for reconsideration was denied by the hearing examiner's inaction. See 14 DCMR § 4013.5 (2004). The decision contained the following findings of fact:

1. The Petitioner took possession of the rental unit on or about June 1, 1989 and executed the lease agreement at that time. The Petitioner has resided at the subject premises at all relevant times, without interruption;

2. Respondent Winn Management/Atlantic Gardens manages the subject property;

3. The Petitioner is a disabled resident living in an apartment designated for the disabled;

4. The Respondent "knowingly" and "willfully" violated the Act;

5. The subject housing accommodation is not properly registered with the RACD;

6. The subject housing accommodation is not exempt from the provisions of the Title II of the Act.

7. The Petitioner did not have either actual or constructive notice that the housing accommodation is exempt from rent stabilization provisions of the Act. The Petitioner's lease did not contain a clause that would have put her on actual notice of the exemption. Furthermore, the Respondent did not provide evidence that the Registration/Claim of Exemption form was posted in a public place within the housing accommodation or that the Respondent mailed a copy of the RACD Registration/Claim of Exemption form to each of the tenants to place them on notice of the alleged exempt status of the subject property. The Respondent's failure to do so is a violation of the requirements of the Act.

8. The Examiner has jurisdiction to address the Petitioner's claim regarding the substantial reduction of services or facilities of the unit, since the Housing Accommodation is not exempt pursuant to the Rental Housing Act of 1985.

9. The Petitioner was adversely affected by excessive mold and mildew; constant flooding; the holes in the walls and ceiling; non-working stove; feces in her apartment; urination on the handrails outside of her unit and trash strewn outside of her unit from residents and neighbors.

10. All other findings of fact made by the Examiner in this Decision and Order are incorporated by reference in this section of Findings of Fact.

Winn Mgmt. v. Burton, TP 28,370 (RACD July 6, 2007) (Decision) at 3-4. The hearing examiner concluded as a matter of law:

1. The Petitioner has proved, by a preponderance of evidence that the housing accommodation in which Petitioner resides is not exempt under Title II of the Act.

2. The Petitioner has proved, by a preponderance of the evidence, that the Respondent has retaliated against her in violation of D.C. Official Code §42-3505.02.

3. The petitioner has proved by a preponderance of the evidence that Respondent substantially reduced related repair and maintenance services to which she was entitled in violation of the Act.

4. Petitioner is entitled to a rent refund in the amount of $3,456.00, pursuant to Sect. 42-3509.01(a) for Respondent having substantially reduced Petitioner's related repair and maintenance services.

5. Petitioner is entitled to a trebled rent refund, pursuant to Sect. 42-3509.01(b) in the amount of $10,368.00 for Respondent's having reduced Petitioner's repair and maintenance services in bad faith.

Decision at 15.

II. ISSUES ON APPEAL

A Notice of Appeal was filed with the Commission on August 10, 2007. The housing provider raised the following issues:

A. Whether the Commission can review the Rent Administrator's denial of appellant's motion for reconsideration.

B. Whether there was sufficient evidence on record at the time of the hearing to establish that the property in question was federally subsidized, thereby rendering it automatically exempt from rent control and allowing the housing provider to assert this defense on appeal, or whether the hearing examiner's denial of the motion for reconsideration was an abuse of discretion and should be reversed, in accordance with the application of the test set out in Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478 (D.C. 1996).

Notice of Appeal at 2-4.

III. DISCUSSION

A. Whether the Commission can review the hearing examiner's denial of appellant's motion for reconsideration.

The denial of a motion for reconsideration shall not be subject to reconsideration or appeal. See 14 DCMR § 4013.3 (2004). In its appeal, the housing provider asserts that 14 DCMR § 4013.3 does not apply to its motion for reconsideration because it is seeking to set aside an award entered by default. Appeal at 1. The housing provider cites 14 DCMR § 4013.1(a) as its basis for this assertion, which states in pertinent part, "Any party served with a final decision and order may file a motion for reconsideration…If there has been a default judgment because of the non-appearance of the party." This

section of the DCMR refers to parties that are seeking reconsideration of a final decision for the first time. The housing provider filed a motion for reconsideration on July 23, 2007, which was denied on August 6, 2007. Due to the fact that the housing provider has already filed a motion for reconsideration that has been denied, it is subject to the restriction placed by 14 DCMR § 4013.3 (2004).

The unequivocal language of 14 DCMR § 4013 (2004) precludes the Commission from considering the housing provider's appeal based on the denial of the Motion for Reconsideration, including denial by lapse of time. See Killingham v. Wilshire Inv. Corp., TP 23,881 (RHC Sept. 30, 1999).

Accordingly, this appeal issue is denied.

B. Whether there was sufficient evidence on record at the hearing to establish that the tenant's unit was federally subsidized, thereby rendering it automatically exempt from rent control and allowing the housing provider to assert this defense on appeal.

When a party fails to appear at the hearing before the Rent Administrator, the law precludes the Commission from reviewing the substantive issues raised in the appellant's notice of appeal, except where the appellant challenges a resulting default judgment. In DeLevay v. District of Columbia Rental Hous. Comm'n, 411 A.2d 354 (D.C. 1980), the District of Columbia Court of Appeals held that a party who fails to appear at a hearing before the Rent Administrator is not an "aggrieved party" within the meaning of D.C. OFFICIAL CODE § 42-3502.16(h) (2001) and therefore lacks standing to challenge the results on appeal.

However, in John's Props. v. Hilliard, TPs 22,269 & 21,116 (RHC June 24, 1993), the Commission held that it may review the issues raised in a party's notice of appeal

when that party moves the Commission to vacate a default judgment based on a failure to appear, because the party did not receive notice of the hearing.

The housing provider admits that notice was in fact received; however they assert that they have a meritorious defense for their absence, and are therefore challenging the default judgment that resulted from their absence at the OAD hearing. Appeal at 3. Therefore, although the housing providers in the instant case failed to appear at the hearing before the Commission, the Commission may still exercise its discretion and grant the tenant's request to review the merits on the default judgment issue, as the only reviewable issue on appeal under Johns Props.

When a party petitions the Commission to set aside a default judgment based on a failure to appear at an OAD hearing, the Commission must determine whether the moving party satisfies the four factors as identified by the Court in Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478 (D.C. 1996). Those factors are: "(1) whether the movant had actual notice of the proceeding; (2) whether he acted in good faith; (3) whether the moving party acted promptly; and (4) whether a prima facie adequate defense was presented. Against these factors, prejudice to the non-moving party must be considered." Radwan, 683 A.2d at 481 (quoting Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979)). In the instant case, as in Radwan, the housing provider filed an appeal and asked the Commission to vacate a default judgment.

The first factor in Radwan is whether the Appellant received actual notice of the OAD hearing. There is sufficient record proof demonstrating that notice of the OAD hearing was properly served on the housing provider. Additionally, the housing provider does not contest the fact that notice was received on December 10, 2005. The housing

provider's notice of appeal explains that David Bernardo, local manager of the property, was out of the office during the month of December 2005 and the beginning of January 2006. Notice of Appeal at 3. Appellant explains that Mr. Bernardo was the sole representative of this case and upon an injury to his ankle, no other representative was aware of the hearing date for this case.

The record evinces proper service of the OAD notice upon the housing provider. Consequently, the first factor in the Radwan test is satisfied, thereby disposing of any further inquiry as to the remaining three factors.

The housing provider in the instant case received notice and failed to appear for the OAD hearing. They then filed an appeal challenging the merits of the hearing examiner's decision and order and the entry of the default judgment. Since the housing provider did not appear at the OAD hearing, they lacked standing to challenge the results on appeal.

Applying the Radwan four-part test, the Commission concludes that the housing provider failed to satisfy the first prong of the test because record evidence demonstrates that the housing provider received notice of the OAD hearing. In accordance with Radwan, the housing providers' request to vacate the default judgment is denied.

Notwithstanding housing provider's failure to appear, and its lack of standing to appeal the merits of the default judgment, the housing provider argues that the evidence of record reflects that the housing accommodation was exempt from Title II of the Act.

The housing provider maintains that the Tenant's lease agreement which was introduced at the hearing indicates the rent to be subsidized and regulated by the Department of Housing and Urban Development (HUD). Notice of Appeal at 4.

Accordingly, the housing provider contends that the tenant's lease agreement on record, dated June 1989, is sufficient evidence to establish that the housing accommodation is federally subsidized and therefore exempt from rent control; and also that the hearing examiner erred in her conclusion that there was no claim of exemption form on file since this is not a requirement of housing accommodations that are federally subsidized. See D.C. OFFICIAL CODE §42-3502.05 (2001).

In Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000), the hearing examiner found the tenant's rent was increased in less than 180 days, in violation of 14 DCMR § 4205.5(c) (2004). The housing provider appealed a denied motion for reconsideration stating in pertinent part that it was exempt from the requirements of §§ 42-3502.05(f) through 42-3502.19, pursuant to D.C. OFFICIAL CODE § 42-3502.05(a)(1) (2001). Although the housing provider was present at the OAD hearing, the housing provider did not introduce any hearing testimony or documentary evidence of the housing provider's alleged exemption from the Act based on a federally subsidized mortgage. The housing provider relied upon §42.-3502.05(a)(1), the Registration/Claim of Exemption Form on file with the RACD, and a statement allegedly made off the OAD hearing record by the assistant property manager, representative for appellant. Id at 6.

The Commission affirmed the decision of the hearing examiner stating: "We conclude some evidence of the exemption must be presented at the OAD hearing, not merely an assertion, or oral statement, or the Registration/Claim of Exemption Form, for the Commission to review to determine the record contains substantial evidence to support the claim of exemption. D.C. OFFICIAL CODE § 42-3502.16(h)." Id at 13.

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission … may seek judicial review of the decision … by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The Court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 28,370 was mailed by priority mail, with confirmation of delivery, postage prepaid this **12th day of May, 2008**, to:

Phillip L. Felts, Esquire
Schuman & Felts, Chtd.
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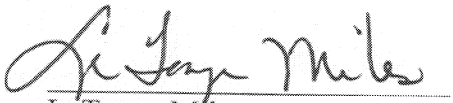

LaTonya Miles
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As the housing provider failed to appear at the OAD hearing, it was not able to present any evidence of its claimed exemption. The only evidence proffered by the housing provider is the tenant's lease agreement from June 1989 previously on record. In accordance with Vista Edgewood Terrace, this evidence alone is not sufficient to support the housing provider's claim that the housing accommodation is exempt from the Act and therefore outside the jurisdiction of the RACD.

IV. CONCLUSION

The hearing examiner's decision and order is affirmed. The housing provider's appeal is DISMISSED for failure to show "lack of notice" for the Commission to set aside the default judgment entered by the hearing examiner upon its failure to appear at a scheduled hearing pursuant to Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478 (D.C. 1996); Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000);

SO ORDERED.

RONALD A. YOUNG, CHAIRPERSON

DONATA L. EDWARDS, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."